



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

OBJECTION TO AN  
APPURTENANT RIGHTS CLAIM

Form APRT-OBJ

For Official Use Only:

FILED: SEP 21 2012

2012 SEP 21 PM 1:23

**Instructions:** Complete one (1) "Objection to an Appurtenant Rights Claim Form" (Form APRT-OBJ) for each Appurtenant rights claim to which you object.

- Any person or entity with a legal or material interest in the water may file written objections. Persons filing objections must serve copies of the written objection and all related documentation / evidence 1) on the applicant; and 2) on the Commission on Water Resource Management, P.O. Box 621, Honolulu, HI 96809.
- Appurtenant rights claimants will have an opportunity to submit a rebuttal to the written objections.
- For questions, contact the Commission's Stream Protection and Management Branch at (808) 587-0234.

**A. OBJECTOR**

NAME/COMPANY

Wailuku Water Company, LLC

Contact Person

Avery B. Chumbley

Mailing Address

P. O. Box 2790, Wailuku, Hawaii 96793

Phone

808/244-7079

Fax

808/242-7968

E-mail Address

abc@aloha.net

**Explain your legal or material interest in objecting to this Appurtenant rights claim.**

Wailuku Water Company, LLC is the owner and operator of the private distribution system through which the Applicant receives surface water. Determination of Applicant's claim of an appurtenant right to water that is distributed through Wailuku Water Company, LLC's distribution system may impact the operation of the distribution system and will affect the property rights of Wailuku Water Company, LLC.

**B. APPLICANT (As listed in the Public Notice)**

NAME/COMPANY

Wailuku Country Estates Irrigation Co.

Use Permit Application No.

for German & Evangeline Failano

Mailing Address

c/o Maui Land Broker & Property Mgt.

P.O. Box 1673

Wailuku, HI 96793

Identify all Tax Map Keys (TMK)

SWUPA# 2189/2190N

TMK: (2)3-3-017-032

**C. REASON(S) FOR OBJECTION**

Select all that apply below. The objector has the burden of proof on all objections.

☐ The parcel was not used as a residence or for cultivation at the time of the Mahele.

☒ The Appurtenant right to water has been reserved or extinguished.

☒ There are materially false statements or representations in the claimant's application for Appurtenant rights.

Summarize carefully your objection and how approval of this Application would adversely affect your legal interests (Use separate page if needed):

The claim must be reviewed in light of the following:

1-Whether the claim properly characterized the source of the water for which the claim is asserted;

2-Whether the rights claimed are subject to Public Utilities Commission Regulation; and

3-Whether the rights have been extinguished.

See the attached sheets which expand on the objections and provide documentary support for the objection(s).

**Supporting documentation / evidence must be provided on separate sheets.**

**D. OBJECTOR SIGNATURE**

☐ By checking this box (for electronic submissions) or signing below (for hardcopy submissions) indicates that the signatory understands and swears that the information provided is accurate and true to the best of their knowledge.

Print Name:

Avery B. Chumbley,  
Authorized Representative

Signature:

Date:

September 18, 2012

FILE ID:

SWUP. 2189/2190

DOC ID:

10141

Form APRT-OBJ 08/29/2012

### Whether the Claim Properly Characterized The Source of Water

The claim contains an ambiguity or possibly a mischaracterization on the water source for the appurtenant right.

A claimant to an appurtenant right must establish that the surface water was taken directly from the stream, or from an auwai that was connected to a stream, at the time of the original conversion of the property to fee simple title.

Claims based on surface water taken from a privately owned distribution system and not from a stream, especially a distribution system that did not exist at the time of the original fee simple conversion, does not establish an appurtenant right to surface water delivered through a privately owned distribution system.

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights derives from a diversion that existed at the time of the original fee simple conversion from a stream or an auwai that was then connected to a stream.

In addition, factual and legal questions exist as to whether applicant is required to hold a stream diversion works permit and/or a stream channel alteration permit and whether there is a right to use a privately owned distribution system if the surface water is being diverted through that privately owned distribution system.

**Rights Claimed May be Subject to Public Utilities Commission Regulation**

The claim asserts a right to use surface water that reaches the claimant's property through a distribution system owned by Wailuku Water Company, LLC

The ability of Wailuku Water Company, LLC to deliver water through that distribution system is the subject of a proceeding pending before the State of Hawaii Public Utilities Commission ("PUC").

Any determination by the Commission on Water Resource Management on claims in which the surface water is delivered through use of the distribution system owned by Wailuku Water Company, LLC must include a condition that the delivery of the surface water is subject to applicable terms, conditions, rules, regulations, decisions, orders, tariffs, and actions of the PUC (collectively "PUC Regulation")

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights may be subject to PUC Regulation.

### **Were Appurtenant Water Rights Extinguished**

Appurtenant rights to surface water are created at the time the original conversion to fee simple land. While an appurtenant right to surface water cannot be transferred separately and apart from land to which it attaches, the right can be extinguished.

The appurtenant right to surface water is extinguished if the Grantor of the property transfers the property and either reserves the right to the Grantor or transfers the property without transferring the appurtenant right.

The conveyance document in the chain of title to the subject property contain language to the following effect:

EXCEPTING, RESERVING AND GRANTING, however, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property, including the right to develop and utilize the same; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon.

Accordingly, factual and legal questions exist as to whether an appurtenant right has been extinguished.



R-415 STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED  
AUG 21, 2002 08:01 AM  
Doc No(s) 2002-146581



65 3/9 Z6

/s/ CARL T. WATANABE  
ACTING  
REGISTRAR OF CONVEYANCES  
CONVEYANCE TAX: \$10200.00

LAND COURT SYSTEM	REGULAR SYSTEM
Return by Mail ( <input checked="" type="checkbox"/> ) Pickup ( <input type="checkbox"/> ) To:	
CGM, LLC P O BOX 1237 KAMUELA HI 96743	TGOH: 200107798 -S TGES: A1-204-1649 MARK RENSCHEN

Tax Key: (2) 3-3-002-001 Total No. of Pages: 105  
(Lot A-2)

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address is P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee as a tenant in severalty, all of Grantor's

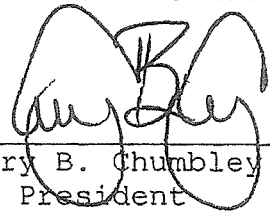
and permitted assigns, according to the context hereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

This instrument may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

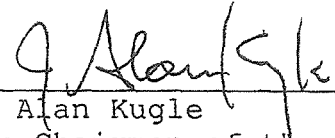
IN WITNESS WHEREOF, the Grantor and Grantee have executed these presents on this 21<sup>st</sup> day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By

  
Avery B. Chumbley  
Its President

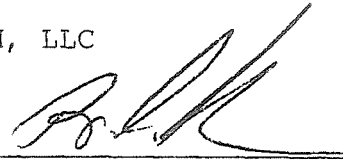
By

  
J. Alan Kugle  
Its Chairman of the Board

Grantor

CGM, LLC

By

  
Brian A. Anderson  
Its Manager

25. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : SUBDIVISION AGREEMENT (AGRICULTURAL USE)  
DATED : July 26, 2002  
RECORDED : Document No. 2002-133340  
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the COUNTY OF MAUI

26. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : SUBDIVISION AGREEMENT (LARGE LOTS)  
DATED : July 26, 2002  
RECORDED : Document No. 2002-133341  
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the COUNTY OF MAUI

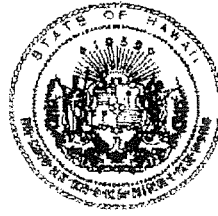
27. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : DEFERRAL OF SUBDIVISION REQUIREMENTS AGREEMENT  
DATED : July 29, 2002  
RECORDED : Document No. 2002-133862  
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the DEPARTMENT OF WATER SUPPLY OF THE COUNTY OF MAUI

28. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS  
DATED : Aug 21, 2002  
RECORDED : Document No. 2002-146579 /

The foregoing includes, but is not limited to, matters relating to rights and easements for irrigation ditches, reservoirs, water facilities, drainage, water, farming, access, blanket easements, waterline, etc.



R-413

STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED

AUG 21, 2002 08:01 AM

Doc No(s) 2002-146579

/s/ CARL T. WATANABE  
ACTING  
REGISTRAR OF CONVEYANCES

45 1/9 Z6

Return by Mail (☒) Pickup ( ) To:CGM, LLC  
P O BOX 1237  
KAMUELA HI 96743TGOH: 200107798 - S  
TGES: A1-204-1649  
MARK RENSCHEN

Total Page: 45

Tax Map Key: (2) 3-3-002:01 (portion)

DECLARATION OF COVENANTS, CONDITIONS,  
EASEMENTS, RESERVATIONS AND RESTRICTIONS



(c) **Drainage Easement.** For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns a perpetual easement over through, and across the Property, and appurtenant to Wailuku's Land, or appropriate portions thereof, as necessary to accommodate drainage from or across Wailuku's Land in its currently existing and/or natural pattern and flow to its natural place of entry upon and through the Property. Purchaser assumes all liability for damage to persons or property caused by or resulting from the flow of drainage from, over, through or across the Property, from Wailuku's Land in their currently existing and/or natural pattern and flow to its place of entry upon the Property or any interference therewith, and agrees to and shall indemnify, defend and hold harmless Wailuku, its successors and assigns from and against any liability, claim, demand, action or suit arising out of or in connection with such drainage (except loss, liability, claims and/or expenses caused by the negligence, willful act or misconduct of Wailuku).

(d) **Water Reservation.** For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns all water and water rights (surface and ground water) within or appurtenant to the Property, provided, however, that in the exercise of such rights, Wailuku, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the Property or any improvements thereon (with the exception of the maintenance of the Irrigation Ditches as herein defined) or take other action that unreasonably interferes with the development or use of the Property for residential purposes. The right to water herein includes the right to acquire all of the ground water which is subterranean of the Property; provided, however, that any well field which is developed by Wailuku, its successors or assigns, to capture such ground water shall not be located on the Property.

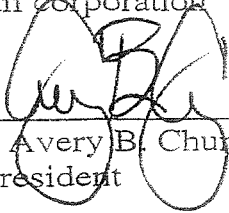
(e) **Farming Reservation.** For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns, as appurtenant to the lands which are located adjacent or in the vicinity of the Property and which are now owned or used or hereafter acquired and used by Wailuku, its successors and assigns (collectively the "Land"), the unrestricted right to engage in any type of farming operation, including, but not limited to, open burning, percolating, evaporating, fertilizing, milling, generating power, water diversion, plowing, grading, storing, hauling, spraying pesticides, irrigating, crop dusting, and all other activities incidental to the planting, farming, harvesting and processing of agricultural products and by-products, which operations may from time to time cause noxious emissions such as noise, smoke, dust, light, heat, vapor, odor, chemicals, vibration, and other nuisances to be discharged or emitted over and upon the Property. Purchaser, for itself, and any person or entity claiming through it and their respective successors and assigns, further acknowledges and agrees that Wailuku, its successors and assigns, shall not be held liable for any nuisance, personal injury, illness or other loss, damage or claim which is caused by or related to such operation and/or use of the Land.

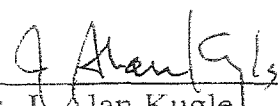
Declaration and the Purchase Agreement, the provisions of this Declaration shall control.

Wailuku and Purchaser have executed this Declaration as of the Effective Date.

WAILUKU AGRIBUSINESS CO., INC.,


a Hawaii corporation

By:   
Name: Avery B. Chumbley  
Title: President

By:   
Name: J. Alan Kugle  
Title: Chairman of the Board

CGM, LLC, a Hawaii limited liability

Company

By:   
Name: Brian A. Anderson  
Title: Manager



R-416

STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED

AUG 21, 2002 08:01 AM

Doc No(s) 2002-146582



12 4/9 Z6

/s/ CARL T. WATANABE  
ACTING  
REGISTRAR OF CONVEYANCES  
CONVEYANCE TAX: \$1.00

LAND COURT SYSTEM

REGULAR SYSTEM

Return by Mail ( ☒ ) Pickup ( ☐ ) To:CGM, LLC  
P O BOX 1237  
KAMUELA HI 96743ACCOM -  
TGOH: 200107798 -S  
TGES: A1-204-1649  
MARK RENSCHENTax Key: (2) 3-3-02:01 (portions)  
(Additional Parcels)

Total No. of Pages: 12

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address is P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby give, grant,

convey, release and forever quitclaim unto the said Grantee, as a tenant in severalty, all of the Grantor's right, title and interest in and to the real property described in Exhibits "A-1" through "A-3" attached hereto and by this reference incorporated herein; subject, however, to all encumbrances noted on said Exhibits "A-1" through "A-3".

EXCEPTING AND RESERVING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon or take other action that unreasonably interferes with the development or use of the Property for residential purposes.

TO HAVE AND TO HOLD the same, together with any improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging or appertaining unto the Grantee, forever.

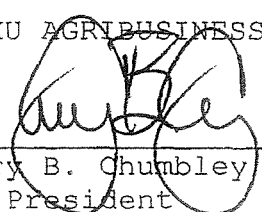
It is understood and agreed that the term "property" shall be deemed to mean and include the property specifically described in Exhibits "A-1" through "A-3", all buildings and improvements thereon (including any personal property described

in Exhibits "A-1" through "A-3") and all rights, easements, privileges and appurtenances in connection therewith, that the terms "Grantor" and "Grantee", as and when used hereinabove or hereinbelow shall mean and include the masculine or feminine, the singular or plural number, individuals, trustees, or corporations, and their and each of their respective successors in interest, heirs, representatives, administrators and permitted assigns, according to the context thereof, and the use herein of the singular in reference to a party shall include the plural and the use of a pronoun of any gender shall include all genders. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall be and for all purposes deemed to be joint and several.

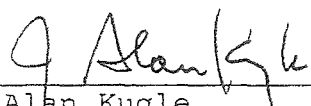
IN WITNESS WHEREOF, the Grantor has executed this instrument as of the 21<sup>st</sup> day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By

  
Avery B. Chumbley  
Its President

By

  
J. Alan Kugle  
Its Chairman of the Board

Grantor



R-417

STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED

AUG 21, 2002 08:01 AM

Doc No(s) 2002-146583



26 5/9 26

/s/ CARL T. WATANABE  
ACTING  
REGISTRAR OF CONVEYANCES  
CONVEYANCE TAX: \$1.00

## LAND COURT SYSTEM

## REGULAR SYSTEM

Return by Mail ( ☒ ) Pickup ( ☐ ) To:CGM, LLC  
P O BOX 1237  
KAMUELA HI 96743

Accom

TGOH: 200107798 -S  
TGES: A1-204-1649  
MARK RENSCHENTax Key: (2) 3-3-02:01 (portions)  
(Roadway Lots)Total No. of Pages: 26QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby give, grant, convey,

release and forever quitclaim unto the said Grantee, as a tenant in severalty, all of the Grantor's right, title and interest in and to the real property described in Exhibits "A-3" through "A-12" attached hereto and by this reference incorporated herein; subject, however, to all encumbrances noted on said Exhibits "A-3" through "A-12".

EXCEPTING AND RESERVING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon or take other action that unreasonably interferes with the development or use of the Property for residential purposes.

TO HAVE AND TO HOLD the same, together with any improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging or appertaining unto the Grantee, forever.

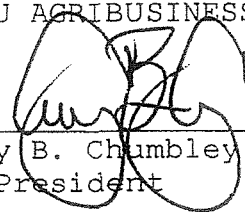
It is understood and agreed that the term "property" shall be deemed to mean and include the property specifically described in Exhibits "A-3" through "A-12", all buildings and improvements thereon (including any personal property described

in Exhibits "A-3" through "A-12") and all rights, easements, privileges and appurtenances in connection therewith, that the terms "Grantor" and "Grantee", as and when used hereinabove or hereinbelow shall mean and include the masculine or feminine, the singular or plural number, individuals, trustees, or corporations, and their and each of their respective successors in interest, heirs, representatives, administrators and permitted assigns, according to the context thereof, and the use herein of the singular in reference to a party shall include the plural and the use of a pronoun of any gender shall include all genders. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall be and for all purposes deemed to be joint and several.


IN WITNESS WHEREOF, the Grantor has executed this instrument as of the 21<sup>st</sup> day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By

  
Avery B. Chumbley  
Its President

By

  
J. Alan Kugler  
Its Chairman of the Board

Grantor